1983

Hansen's Farm Supply, Inc v. Paul Fjeldsted dba Fjeldsted Oil Company : Brief of Defendant-Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

HANSEN'S FARM SUPPLY, INC.,)

Plaintiff and Respondent,)

-vs- Case No. 18989

PAUL FJELDSTED dba FJELDSTED OIL COMPANY,)

Defendant and Appellant.)

BRIEF OF DEFENDANT - APPELLANT

To reverse the Judgment of the Sixth Judicial District Court of Sanpete County, State of Utah, the Honorable Don V. Tibbs, Judge.

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NATURE OF RELIEF SOUGHT ON APPEAL

Defendant-Appeallant seeks a reversal of the Judgment of the District Court awarding damages to the Plaintiff on a open account; and a remand of the case to the District Court for re-trial of the properly admitted evidence.

SUMMARY OF FACTS

Defendant-Appellant had a long-standing open account with Plaintiff-Respondent. Defendant purchased petroleum

products from Plaintiff, a wholesale distributor. Plaintiff brought suit for payment related to three (3) invoices for purchases of petroleum products by the Defendant. These in-invoices were unsigned and Defendant denies ordering, acknowledging or receiving delivery. Plaintiff introduced as an exhibit a delivery ticket allegedly made out by the company from whom Plaintiff purchased the petroleum products and by whom they were allegedly delivered to Defendant. Defendant objected to this exhibit and appeals from the trial court's failure to exclude this exhibit and the judgment based thereon. Reference made herein to evidence given at trial is made by transcript page numbers, eg. T-1.

STATEMENT OF FACTS

Defendant-Appellant owns and operates a retail outlet for petroleum products. Plaintiff-Respondent is a corporation which among other things distributes petroleum products on a wholesale basis to retailers such as Defendant, (T-7, 32, 34). Defendant has had a long standing open account with Plaintiff and has made numerous purchases of petroleum products from Plaintiff on credit, (T-11, 34). Defendant

received monthly billings on this account from Plaintiff. Included in this billing statement were the invoices evidencing individual purchases, (T-9). Defendant made payments to Plaintiff on this account and it was stipulated by the parties that the unpaid balance of this account was directly attributable to four (4) invoices, one of which was later disallowed as short claim, (T-3, 43). The issue at trial was whether the products listed in the three (3) remaining invoices were actually delivered to and received by Defendant, (T-3). Defendant testified that the majority of the purchases made from Plaintiff were picked up and transported by Defendant, (T-36, 37). However the disputed invoices were for purchases which were neither delivered by Plaintiff nor picked up by Defendant; but rather were delivered allegedly by a third party, Metro Oil Products, (T-19, 27). The dates of these deliveries were January 30, 1980; March 15, 1980 and April 17, 1981, (T-15, 19, 21).

Plaintiff's president, Erval Hansen, testified at trial that there was no specific order placed by Defendant for these purchases, but that due to the prevailing shortages of petroleum products at the time, there was a standing order for

all the gas and diesel that Plaintiff could get, (T-24). Defendant testified that no such deliveries were ever made and in fact Plaintiff's invoices for these alleged purchases were unsigned, (T-37, 38, 39). As proof of actual delivery Plaintiff sought to introduce a document identified as a "delivery ticket" prepared totally by the afore-mentioned third party, Metro Oil Products. This ticket purports to evidence that a Metro Oil Products tanker truck delivered the March 15, 1980 purchase of 9,000 gallons of diesel, (T-19, 27). Defendant objected to this exhibit, Exhibit #5, on the grounds that it had been wholly prepared by a third party and that insufficient foundation had been laid for its admission, (T-27). The trial court overruled this objection upon the grounds that said delivery ticket was received in the regular course of Plaintiff's business, (T-27).

QUESTION PRESENTED

Does a writing, offered as a memorandum of facts and occurrences, which has been totally prepared by a third party who is neither an agent nor employee of the profferring party; but rather a totally separate and distinct business entity, qualify

as an exception to the general hearsay rule of evidence; and if it does is the profferring party competent to testify as to its preparation and trustworthiness as required by the business record exception.

ARGUMENT

POINT I

THE EVIDENCE ADMITTED OVER DEFENDANT'S OBJECTION DERIVES ITS VALUE AND CREDITBILITY FROM A THIRD PARTY AND AS SUCH IS HEARSAY.

The evidence in question is a so-called delivery ticket prepared totally by Metro Oil Products, a third party who is neither involved in this lawsuit nor was called to testify as a witness at trial. The ticket purports to substantiate one of the alleged deliveries listed in the disputed invoices. There is no question that as a statement made by a third party, out of court, and related or introduced as evidence by a witness at trial, this evidence is hearsay, as as such is inadmissable under Utah law, State in Interest of K.D.S., 578 P.2d 9 (Utah 1978); Butler v. Butler, 23 U. 2d 259, 461 P.2d 727 (1969); Richards v. Lake Hills, 15 U.2d 150, 389 P.2d 66

(1964); John C. Cutler Assoc., v. [illegible], 3 U. 2d 101, 279 P.2d 700 (1955); Wilson v. Oldroyd, 4 U. 2d 362, 267 P. 2d 759 (1954); Savage v. Nielsen, 114 U. 22, 197 P. 2d 117 (1948); see also 29 Am. Jur. 2d Evidence §§ 493, 600.

The fact that the evidence is in written form and is offered as an exhibit does not overcome this defect, 29 Am. Jur. 2d Evidence §§ 498, 834, 881.

In order to properly admit this exhibit into evidence the trial court must have necessarily held that it qualified as one of the enumerated exceptions to the hearsay rule, Rule 63 Utah Rules of Evidence. More particularly subsection (13) of Rule 63.

POINT II

THE BUSINESS RECORD EXCEPTION TO THE HEARSAY RULE DOES NOT EXTEND TO RECORDS THAT ARE PREPARED BY A THIRD PARTY WHO IS NEITHER AN EMPLOYEE NOR AGENT OF THE PROFFERING PARTY.

There is an obvious distinction between the type of writing which is intended to be covered by the business record exception to the hearsay rule, Rule 63, Utah Rules of Evidence subsection (13), and the type of writing which is at issue in this case.

This distinction is one of authorship or preparation. The first is a writing, offered as a memorandum of facts or occurrences involved in the case, which has been prepared internally by the business entity proffering said writing as an exhibit at trial. The second is a writing, offered as a memorandum of facts and occurrences, which has been totally prepared by a separate and distinct business entity from that which seeks to introduce said writing as evidence at trial. The plain and clear language of Rule 63 (13) U.R.E. unquestionably deals with only those internal business records which are made by the business entity proffering such writings at trial. Rule 63 (13) U.R.E. states:

> HEARSAY EVIDENCE EXCLUDED--EXCEPTIONS
>
> Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> (13) Business Entries and the Like. Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business, at or about the time of the act, condition or event recorded and that the sources of information from which made and the method and circumstances of the preparation were such as to indicate their trustworthiness. emphasis added.

The reasoning of the trial court in admitting the writing in question into evidence was that it had been received by Plaintiff in the regular course of its business. The requirement of Rule 63 (13) is that the writing be made by the the business not merely received. This distinction is discussed further in Point III herein.

Even if this court were to determine that the language of Rule 63 (13) should be extended so as to include external business records, the writing in question would still be inadmissable under Rule 63 (13) for the reason that Plaintiff's president, Ervall Hansen, would not be competent to testify that the delivery ticket was made in the regular course of business of Metro Oil Products. Further Mr. Hasen would not be competent to testify as to the sources of information from which it was made, the method and circumstances of its preparation nor its trustworthiness as required by Rule 63 (13). Without such a competent witness the trial court could in no way meet its obligation under Rule 63 (13), and could not allow such a writing into evidence over the objection of Defendant. Further, the reasoning that Plaintiff received this writing in the regular course of its business certainly does not meet the requirement of trustworthiness under Rule 63 (13).

Utah cases dealing with the business record exception to the hearsay rule have dealt only with internal records i.e., prepared by an agent or employee within the business entity seeking to introduce them, Shurtleff v. Jay Tuft Co., 622 P. 2d 1168 (Utah 1980); Gull Laboratories Inc. v. Louis A. Buserco, 589 P.2d 756 (Utah 1978); Bambrough v. Bethers, 552 P. 2d 1286 (Utah 1976).

POINT III

IT IS INEQUITABLE TO ALLOW EXTERNAL BUSINESS RECORDS TO BE ADMITTED INTO EVIDENCE UNDER THE BUSINESS RECORD EXCEPTION TO THE HEARSAY RULE.

The justification and reasoning of the business record exception to the hearsay rule is that documents which have been made simultaneously with events and transactions and which memorialize those events and transactions may be used to introduce those events and transactions into evidence where various individuals would otherwise have to be called to testify and to recall possibly numerous and complex facts. Further the individual introducing such exhibits may give foundational testimony as to their origin i.e., by whom prepared, the manner in which they were prepared and safeguards as to accuracy, much

as Plaintiff's president did in this case with respect Plaintiff's internal invoices. However when external records are allowed into evidence as exhibits, the opposing party is afforded no opportunity to inquire as to their origin, by whom prepared and what steps were taken to insure their accuracy. To do so denies the opposing party any right to challenge the relevancy, compentency and truthfullness of any such documents through cross-examination. Such documents are clearly unsworn statements made out of court by some third party and the mere fact that they were said to have been received by the proffering party in the regular course of business is no justification for denying the opposing party the rights set forth above.

POINT IV

FAILURE TO EXCLUDE EXTERNAL BUSINESS RECORDS IS NOT HARMLESS ERROR IN THIS CASE.

The only issue involved in this case is whether or not the merchandise in question was actually delivered. The delivery ticket prepared by Metro Oil Products is the only proof that Plaintiff offered as to actual delivery. In fact Plaintiff's president bases his own recollection upon this writing. If this exhibit is excluded from evidence, Plaintiff has no direct

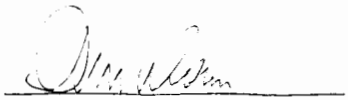
evidence that the petroleum products were ever delivered to Defendant. Therefore, improper admission into evidence of this exhibit can hardly be considered harmless.

CONCLUSION

This entire case revolves around a single exhibit and issue. The so called delivery ticket purports to evidence that Defendant received merchandise from Plaintiff which he did not pay for. This ticket does not comprise a portion of the business records made by the Plaintiff in the regular course of business but rather by a completely distinct and separate business entity, who was neither a party to this action nor called to testify at trial. Defendant was denied any opportunity to question or challenge the relevancy, compentancy or truthfullness of this exhibit through cross-examination. For these reasons and for others set forth herein Defendant-Appellant respectfully requests that this court reverse the decision of the District Court and remand this case for re-trial of the properly admitted evidence.

DATED this 16 day of May, 1983.

Respectfully submitted,



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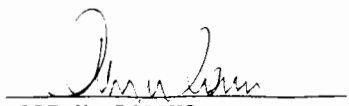
CERTIFICATE OF SERVICE

SERVED the foregoing Brief of Appellant by Mailing two copies thereof, postage prepaid to DON E. OLSEN, of Beaslin, Nygaard, Coke and Vincent, at 1100 Boston Building, Salt Lake City, Utah 84111, this 16 day of May, 1983.



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